COMPASSIONATE CONSUMERISM WITHIN THE GATT REGIME: CAN BELGIUM'S BAN ON SEAL PRODUCT IMPORTS BE JUSTIFIED UNDER ARTICLE XX?

ROBERT GALANTUCCI*

TABLE OF CONTENTS

* B.A., 2005, Villanova University, J.D., 2008, Fordham University School of Law. The author would like to thank Professor Robert Howse, for his comments and suggestions on an earlier draft of this article. The author would also like to thank the editors and staff of the *California Western International Law Journal* for their efforts in the preparation of this piece.

I. INTRODUCTION

Despite protests from the Canadian government, Belgium has recently imposed a moratorium on the sale of seal products.[1] Animal rights activists have long objected to seal hunting practices prevalent in parts of Canada, where "seals continue to be killed with so-called hakapik clubs, used for crushing the mammals' skulls."[2] Activists have also been pressuring Germany and the European Commission to take measures to discourage the sale of seal products.[3] Belgium's law restricting the import, marketing, and sales of all seal products entered into force in April 2007, making Belgium the first country to introduce a ban.[4] Despite opposition from high-level Canadian officials, Belgium has not ceded any ground in the debate—it is one that has ignited passions on both sides.[5] In response, the Canadian government began the process of formal consultations before the World Trade Organization (WTO), arguing that "the Belgian ban on the importation and marketing of seal products is a violation of Belgium's international trade obligations under the WTO."[6]

---

1. Brian Adeba & Lee Berthiaume, *Canada Challenges Belgian Seal Ban*, EMBASSY (Can.), Aug. 1, 2007, http://embassymag.ca/page/view/.2007.august.1.sealban.

2. Theophilos Argitis, *Canada Files Complaint at WTO Against Belgium Over Seal Ban*, BLOOMBERG.COM, July 31, 2007, http://www.bloomberg.com/apps/news?pid=20601082&sid=a7LVRFcx2YeY&refer=canada.

3. Adeba & Berthiaume, *supra* note 1.

4. *Id.*

5. *See id.*

6. Press Release, Foreign Affairs and Int'l Trade Canada, Canada to Request WTO Consultations on Belgium's Ban on the Importation of Seal Products (July 31,

While the seal market may be small compared to other industries that have been involved in recent WTO disputes, Canada's complaint raises important issues as to the scope of the Article XX exceptions to the General Agreement on Tariffs and Trade (GATT).[7] Further, this dispute—even before any WTO consultations have taken place—already threatens to instigate retaliatory measures from other countries with interests in the animal products trade.[8] The way the WTO treats the Belgian law could have significant implications for trade restrictions because of concerns with morality and health. This article assesses the strength of a potential exception available to Belgium based on commitments under the GATT.

Part II discusses the Belgian law, Canada's complaint, and the competing concerns of animal rights activists, industry players, and traditional Canadian cultures. Part III of this article briefly describes the general obligations of WTO member states, and outlines the relevant exceptions. Part IV provides a more detailed assessment of the scope of the GATT Article XX(a) and (b) exceptions and Belgium's ability to invoke these exceptions. Finally, Part V concludes with a predictive and normative assessment of an Article XX defense of Belgium's prohibition on seal products.

II. THE DEBATE

A. Belgian Law and Canada's Complaint

The Belgian ban on seal products consists of two laws: a ban on the making and marketing of products derived from seals[9] and a law

---

2007).

7. Request for Consultations by Canada, *European Communities—Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/1 (Oct. 1, 2007), *available at* http://www.worldtradelaw.net/cr/ds369-1(cr).pdf; *see* General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

8. Adeba & Berthiaume, *supra* note 1 ("The dispute has prompted a war of words across the Atlantic, including a threat by Liberal MP Scott Simms of Newfoundland to push for a ban on German wild boar imports if that country goes ahead with a moratorium on Canadian seal.").

9. *La Loi Relative à L'interdiction de Fabriquer et de Commercialiser des Produits Dérivés de Phoques*, F. 2007-1590 [C-2007/11138], Mar. 16, 2007 (Belg.) (Trade Ban) [hereinafter Belgium Law I].

requiring licenses, which are never granted,[10] before certain products may be imported into Belgium.[11] The laws aim "to prohibit the production and marketing of products derived from seals for reasons of public opinion and animal suffering."[12] On September 25, 2007, Canada submitted its dispute with Belgium to the WTO Dispute Settlement Body.[13] The Request for Consultations asserts that Belgium's laws are inconsistent with "Articles 2.1 and 2.2 of the TBT Agreement [and] . . . Articles I:1, III:4, V:2, V:3, V:4 and XI:1 of [the] GATT 1994."[14] The substantive GATT obligations and relevant exceptions are discussed below in Part III.

B. The Seal Industry

The seal industry plays a small but significant role in the local economies of Newfoundland and Labrador.[15] Several coastal communities derive "between 15% and 35% of their total earned income from sealing."[16] While these numbers may not be particularly large for the country as a whole, the main participants in the industry are "individuals who use it as a source of income at a time of year when economic opportunities are limited in many remote, coastal communities."[17] Additionally, the increase in the value of seal pelts

---

10. INT'L FUND FOR ANIMAL WELFARE, IMPORTING CRUELTY: CANADA'S COMMERCIAL SEAL HUNT: CRUEL AND UNSUSTAINABLE 32 (2006).

11. *L'Arrêté Ministériel Modifiant L'arrêté Ministériel du 15 Septembre 1995 Soumettant à Licence L'importation de Certaines Marchandises*, F. 2004-1983 [C-2004/11258], May 28, 2004 (Belg.) (Import licensing requirement) [hereinafter Belgium Law II].

12. Comm. on Technical Barriers to Trade, *Notification of Draft Law*, ¶ 7, G/TBT/N/BEL/39 (Mar. 8, 2006).

13. *Id.*

14. *Id.*

15. Fisheries and Oceans Canada, Seals and Sealing in Canada, *Socio-Economic Importance of the Seal Hunt*, http://www.dfo-mpo.gc.ca/seal-phoque/reports-rapports/facts-faits/facts-faitsSE_e.htm (last visited Mar. 14, 2009).

16. *Id.*; *but see* Humane Soc'y of the United States, *Join the Boycott to End the Hunt*, http://www.hsus.org/marine_mammals/ protect_seals/why_a_boycott_of_ canadian_seafood/ (last visited Mar. 23, 2009) [hereinafter *Join the Boycott to End the Hunt*] (suggesting that an economic justification for the hunt is absent, as sealing accounts for less than one-tenth of one percent of Newfoundland's economy).

17. Fisheries and Oceans Canada, *supra* note 15.

has made the industry particularly profitable in recent years.[18] While the market conditions vary widely, in 2006 the value of the seal hunt was $33 million.[19] That same year, Canada's foreign trade in the industry was approximately $2.1 million.[20] While the overall industry figures are modest, the fact that any import ban could affect employment and traditional practices of Inuit communities presents Canada with a sensitive political decision.[21]

C. Animal Rights Organizations

Animal rights organizations, led by the Humane Society of the United States, issued a public response to the Canadian Department of Fisheries' contentions regarding the seal hunt.[22] The focus of the campaign was to expose the cruel nature of the seal hunt to the public.[23] Video evidence shows "sealers routinely dragging conscious pups across the ice with boathooks, shooting seals and leaving them to suffer in agony, and even skinning seals alive."[24] Hunting practices can be very cruel. One example of this is the fact that "95% of the harp seals killed over the past five years have been under three months of age."[25] Furthermore, the widespread use of clubs in incapacitating the animals is particularly disconcerting to animal rights groups, as an "independent team of veterinary experts . . . concluded that in 42% of the cases they examined, the seal did not show enough evidence of cranial injury to even guarantee unconsciousness at the time of skinning."[26]

---

18. *Id.* (stating that the price per pelt is now $97, which is a 77% increase from 2005).

19. *Id.*

20. Adeba & Berthiaume, *supra* note 1.

21. *See id.*

22. *See* Humane Soc'y of the United States, *The Truth About the Canadian Seal Hunt: A Response to the Canadian Department of Fisheries*, http://www.hsus.org/marine_mammals/protect_seals/the_truth.html (last visited Mar. 23, 2009) [hereinafter *The Truth About the Canadian Seal Hunt*].

23. *Id.*; *see also* Humane Soc'y of the United States, About Us, http://www.hsus.org/about_us/index.html (last visited Mar. 23, 2009).

24. *Join the Boycott to End the Hunt*, *supra* note 16.

25. *Id.*

26. *Id.*

As Belgium and Canada have been unable to fashion a political compromise to satisfy the competing interests of animal welfare groups and the seal pelt industry, the battle has now moved to a legal forum, the WTO, where the Canadian government has challenged Belgium's ban on seal products.[27]

III. BASIC GATT OBLIGATIONS AND EXCEPTIONS

The GATT binds countries to obligations that allow for the free flow of goods between states.[28] When member countries erect barriers to trade, such as import bans, another member may challenge that legislation through WTO consultations and a dispute settlement panel.[29] Accordingly, Canada is currently challenging Belgium's ban on seal products on a number of grounds, including Article XI, which prohibits countries from imposing quantitative restrictions on imports.[30] However, Article XX of the GATT provides several exceptions that allow the countries to take reasonable measures to protect "public morals" and "human, animal or plant life or health."[31] Assuming Belgium's ban on seal products is not an "arbitrary or unjustifiable . . . restriction on international trade" it might fall under an Article XX exception to the GATT's general prohibition on import restrictions.[32]

The Appellate Body of the WTO, in *Reformulated Gasoline* and subsequently in *Shrimp—Turtle*, established the legal process through which a country can justify an Article XX exception.[33] First, a country

---

27. *See supra* notes 4-6.

28. *See generally* Understanding the WTO—Overview: A Navigational Guide, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm (last visited Mar. 23, 2009).

29. *Id.*

30. *See* Request for Consultations by Canada, *supra* note 7, at 2.

31. GATT, *supra* note 7, art. XX(a)-(b).

32. *Id.* at Chapeau.

33. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 498-99 (2002); *see, e.g.*, Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 13-29 (Apr. 29, 1996) [hereinafter *Reformulated Gasoline*]; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, at 46-76 (Oct. 12, 1998) [hereinafter *Shrimp—Turtle AB*]. This process would be applied

must show that the trade-restricting legislation qualifies for a "provisional justification" under the relevant Article XX exception.[34] Belgium must show that its ban is: (1) intended to protect "public morals," or to protect "human, animal or plant life or health;"[35] (2) necessary to achieve these ends;[36] and (3) consistent with the Article XX Chapeau, which prohibits the measure from being arbitrary, unjustifiable, or a "disguised restriction on international trade."[37] The exceptions to Articles XX(a) and XX(b) are discussed in turn.

IV. EXCEPTION UNDER ARTICLE XX(A)—PROTECTION OF PUBLIC MORALS

A. "Public Morals"

While determining the scope of any of Article XX's sections can be controversial, defining XX(a)'s "public morals" exception is even more difficult due to the lack of objective or scientific data.[38] The availability of scientific evidence to help define "public health" or "exhaustible resources" would seem to create a somewhat higher degree of consensus as to their definition than that of "public morals."[39]

The most recent WTO decision to consider the public morals exception was *U.S.—Gambling*.[40] Although the Panel decision was

---

similarly under section (a) and (b), as they both require the measures taken to be necessary. GATT, *supra* note 7, art. XX(a)-(b).

34. GATT, *supra* note 7, art. XX(a)-(b); *see also* Howse, *supra* note 33, at 498.

35. GATT, *supra* note 7, art. XX(a)-(b).

36. *Id.*; *cf. Shrimp—Turtle AB*, *supra* note 33, ¶¶ 46-54 (assessing whether legislation fell within the scope of an Article XX exception for protecting "exhaustible natural resources," and then turning to the question of whether the tactics used were "necessary"); *see also* Alison G. Jones, Comment, *Australia's Damaging International Trade Practice: The Case Against Cruelty to Greyhounds*, 14 PAC. RIM L. & POL'Y J. 677, 698-99 (2005).

37. GATT, *supra* note 7, at Chapeau.

38. Jeremy C. Marwell, Note, *Trade and Morality: The WTO Public Morals Exception After Gambling*, 81 N.Y.U. L. REV. 802, 815-16 (2006).

39. *Id.*

40. *See* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 1.1, 1.6, 1.12, 3.278, WT/DS285/R (Nov. 10, 2004) [hereinafter *U.S.—Gambling Panel*].

appealed to the Appellate Body, the portion of the Panel decision regarding the definition of public morals was upheld, and therefore is the most recent pronouncement on the exception.[41] While the focus of the Panel's assessment was on gambling-related regulations, it did note that

> the content of [public morals] can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. . . . [and] Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.[42]

This definition seems to grant significant leeway to countries in determining the scope of the morality exception. The Panel, however, did not entirely defer to a member state's own definition of morality, but instead inquired into comparable laws in other jurisdictions. For example, the Panel gave significant consideration to state practice when it noted that similar gambling legislation has been adopted elsewhere.[43] This decision indicates that both objective and relative

---

41. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 291-99, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *U.S.—Gambling AB*]. The public morals/public order defense was raised in *U.S.—Gambling* under Article XIV of the General Agreement on Trade in Services (GATS). *U.S.—Gambling Panel*, *supra* note 40, ¶¶ 3.278, 6.535; *see also U.S.—Gambling AB*, *supra*, ¶¶ 5, 296, 299. As the Appellate Body explained in *U.S.—Gambling*,

> Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. . . . [Thus, the Panel and Appellate Body relied on] previous decisions under Article XX of the GATT 1994 relevant for . . . analysis under Article XIV of the GATS.

U.S.—Gambling AB, *supra*, ¶ 291.

42. *U.S.—Gambling Panel*, *supra* note 40, ¶ 6.461.

43. *Id.* ¶ 6.473 & n.914 ("[I]n virtually all parts of the world, gambling activities, when not prohibited entirely, have traditionally been subject to strict regulation, involving civil and criminal laws."). The Panel cited to a number of nations having or developing internet gambling laws, including Australia, Austria, Belgium, Brazil, Canada, Denmark, Estonia, Finland, France, Hong Kong, Iceland, Italy, the Netherlands, Norway, Sweden, the United Kingdom, and Uruguay. *Id.* ¶ 6.473 n.914.

considerations of morality are proper sources in interpreting the breadth of Article XX.

Beyond *U.S.—Gambling*, WTO panels have had little opportunity to develop a jurisprudence for Article XX(a) and the drafting history of this Article is sparse.[44] Accordingly, the context of the Article's enactment is an important "[s]upplementary means of interpretation" in assessing the section's scope.[45] Based on a number of pre-GATT domestic regulations it is clear that moral exceptions to import and export regulations were common at the time of drafting.[46] These exceptions to typical trade rules included import prohibitions on articles varying from images of violence and obscenity, to blasphemous items, to bird plumage.[47] Such exceptions were also present in contemporary treaty regimes in the decades preceding the GATT, and "[a]fter 1927, the moral and humanitarian exception became an established (but not universal) practice in commercial treaties."[48] Among the treaties addressing moral issues, several were related to animal welfare. For example,

> [i]n 1921, a treaty regulating fishing in the Adriatic forbade the use of explosives "calculated to stun or stupefy the fish" and banned the sale of fish "caught by these methods." In 1935, the International

---

44. Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 704-05 (1998).

45. Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; *see also* Charnovitz, *supra* note 44, at 702.

46. Charnovitz, *supra* note 44, at 705-16. Export regulations have accounted for minimizing animal cruelty for over a century. *Id.* at 712, 715.

> For example in 1891, the U.S. Congress authorized the Secretary of Agriculture to examine vessels used in exporting cattle to foreign countries as to the space, ventilation, fittings, food and water supply and other such requirements "as he may decide to be necessary for the safe and proper transportation and humane treatment of such animals.". . . In 1914, the British government prohibited the exportation of horses unless such a horse had been certified by a veterinary surgeon as capable of being worked without suffering. . . . The export controls for cattle and horses were aimed at the humane treatment of domestic animals being moved outside one's territory, and thus were both inwardly and outwardly-directed.

Id. at 715.

47. *Id.* at 706, 714.

48. *Id.* at 708.

> Convention concerning the Transit of Animals provided that "the exporting countries shall take steps to see that the animals [being transported across a border] are properly loaded and suitably fed and that they receive all necessary attention, *in order to avoid unnecessary suffering*.[49]

Import and export policies have historically shown concern for the humane treatment of animals, although the interests of free trade have consistently won out.[50] Nonetheless, the drafters of the GATT in 1947 were certainly aware of a number of morality-based exemptions in other commercial agreements and animal welfare was among these concerns.[51]

One commentator has argued that while Article XX(a) may provide exceptions in certain cases, "it is difficult to give credence to the argument that in the United States marine mammal protection is an equivalent component of 'public morals' as the Hindu religion in India or the Islamic religion in a country like Saudia [sic] Arabia."[52] This comparison appears to be unwarranted. First, there is no indication from the history or text of the exception that the affront on public morals must be so offensive as to offend religious convictions—even assuming for argument's sake that religious principles are inherently stronger than convictions based on other grounds. In practice, it is obvious that import bans need not be religious in nature. For instance, it is widely accepted that a ban based on obscene content would likely meet the threshold for the exception.[53] This is especially noteworthy,

---

49. *Id.* at 712 (emphasis added).

50. Edward M. Thomas, Note, *Playing Chicken at the WTO: Defending an Animal Welfare-Based Trade Restriction Under GATT's Moral Exception*, 34 B.C. ENVTL. AFF. L. REV. 605, 608-10 (1997). Even in a region where the population largely supports animal rights legislation, domestic industries and international trade advocates will often prevent the effective implementation of import restrictions. *See id.* at 609 ("[A]nimal welfare laws are unlikely to survive domestic industry opposition . . . despite the fact that a plurality of lawmakers, with the backing of their constituents, may agree that a practice such as testing cosmetics on animals is unacceptable.") (internal citations omitted).

51. *See supra* notes 47-50 and accompanying text.

52. TED L. MCDORMAN, THE GATT CONSISTENCY OF THE U.S. IMPORT EMBARGO ON HARP-SEAL FUR COATS FROM GREENLAND, § 5.5 (1995), *available at* http://www.highnorth.no/Library/Trade/GATT_WTO/th-ga-co.htm.

53. *See* Thomas, *supra* note 50, at 621.

because despite the polarized definitions that countries often attribute to "obscenity," obscenity can still form the basis for an import ban.[54] This fact is a strong indication that the GATT drafters intended to define "public morals" in accordance with a country's prevailing cultural norms.

In any case, in the last decade the number of countries taking measures to suppress markets for seal products has grown drastically.[55] The state practice of Belgium, as well as a large number of other countries (and perhaps more to come),[56] indicates that the public sentiment supporting the humane treatment of animals is strong. While there are currently no global treaties regarding animal welfare, there is a history of such legislation within the European Union and there are developments toward an international legal regime that addresses the protection of endangered species.[57] While not yet adopted, there have been a number of drafts proposed for international agreements on the humane treatment of animals.[58] Finally, the International Organisation for Animal Health (OIE) has developed as a preeminent body regarding the treatment of animals.[59] The OIE's veterinary base has allowed the organization to produce widely promulgated, science-based guidelines on animal welfare.[60] The organization's membership includes 172 countries and territories—including Canada and Belgium—and it has earned a WTO mandate.[61] While the OIE does not have an official pronouncement on the seal hunt, it has historically addressed issues such as humane slaughter and transport of animals, as well as the slaughter of animals

---

54. *See id.*

55. *See* Press Release, Int'l Fund for Animal Welfare, Belgium Becomes First EU Country to Place a National Ban on All Seal Product Imports (Jan. 25, 2007), *available at* http://www.ifaw.org/ifaw_united_states/media_center/press_releases/1_25_2007_41392.php [hereinafter Int'l Fund for Animal Welfare].

56. *Id.*

57. WORLD ANIMAL NET, PROFESSIONAL ANIMAL PROTECTION SOCIETY MANAGEMENT 123-29, *available at* http://worldanimal.net/onlinebook.html.

58. *Id.* at 124-25.

59. International Organisation for Animal Health, About Us, http://www.oie.int/eng/OIE/en_about.htm?e1d1 (last visited Mar. 23, 2009) [hereinafter OIE]; *see also* WORLD ANIMAL NET, *supra* note 57, at 121.

60. WORLD ANIMAL NET, *supra* note 57, at 121; *see* OIE, *supra* note 59.

61. OIE, *supra* note 59; *see also* WORLD ANIMAL NET, *supra* note 57, at 121.

for disease control purposes.[62] While a hard legal framework may not exist, there is strong evidence of growing international concern for the humane treatment of animals.

Considering the large number of regulations that have been passed to prevent cruelty to animals internationally in conjunction with evidence of Belgium's subjective definition of morality toward animals, Belgium's law would appear to fall within the scope of Article XX(a). The suffering of these animals is a moral concern, especially when they are hunted using inhumane methods.[63] Although animal cruelty may categorically constitute a moral concern under the Article, needless suffering (for example, when less effective hunting tools are used) would seem to fit even more squarely within the morality exception. A large percentage of people quite reasonably view the techniques used in seal pelt removal as immoral.[64] Surveys also indicate that large numbers of Canadians have expressed reservations regarding the seal hunt.[65] Based upon the data collected from these surveys, it appears that the first prong of the test under Article XX(a) would likely be met. The more difficult and more controversial question is whether the import ban is necessary.[66]

B. "Necessary" for the Protection of Public Morals

In determining whether a regulation is necessary, a WTO dispute resolution body considers two factors: (1) the nexus between the regulation's target and the home country,[67] and (2) whether there are

---

62. WORLD ANIMAL NET, *supra* note 57, at 121.

63. *See* Argitis, *supra* note 2 (noting the emotional nature of the current debate).

64. *Join the Boycott to End the Hunt*, *supra* note 16 ("Close to 80 percent of the people who are aware of the Canadian seal hunt in the United Kingdom, the Netherlands, Germany and France oppose it as well.").

65. *Id.* ("Nearly 70 percent of Canadians holding an opinion are opposed to the commercial seal hunt outright, and even higher numbers oppose specific aspects of the hunt such as the killing of seal pups.").

66. Some commentators disagree with this assessment and consider the first step of the analysis, regarding subject matter of the exception, to be the primary challenge in meeting the requirements of the exception. *See, e.g.*, MCDORMAN, *supra* note 52.

67. *Shrimp—Turtle AB*, *supra* note 33, ¶ 133.

less trade-restrictive measures available.[68] Although, as noted, there is sparse jurisprudence on Article XX(a), it is reasonable to believe that a panel would structure its interpretation in the same way as an Article XX(b) dispute.[69]

1. The Nexus Requirement

Pursuant to the nexus requirement, the Panel must assess a regulation to determine the outward nature of the regulation.[70] The Panel uses this analysis to determine if the measure is an attempt to impermissibly compel a foreign country to adopt a law that is more in accord with the regulating state's policies.[71] Many free trade advocates insist that when a country interferes with activities having an effect outside its territorial borders, the country impedes upon other nations' domestic prerogatives and export rights.[72] Accordingly, some criticized Belgium's ban on seal products as an illegitimate exercise of its regulatory power.[73]

In *Shrimp—Turtle*, the Appellate Body specifically avoided the question of whether Article XX(g) imposes an implicit limitation on jurisdiction.[74] The Appellate Body essentially determined that the United States was entitled to ban imports from anglers who, while trolling for shrimp in waters *outside U.S. jurisdiction*, failed to take proper precautions in preventing the incidental death of sea turtles.[75] In so holding, the Appellate Body implied that some sort of "nexus" was required between the object of the regulation and the regulating

---

68. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 165, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (citing Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L6439-36S/345 (Nov. 7, 1989)) [hereinafter *Korea—Beef*].

69. Charnovitz, *supra* note 44, at 729 ("Given the semantic similarity of GATT [A]rticles XX(a) and (b), it seems likely that future panels will use the same framework for an [A]rticle XX(a) defense.").

70. Peter Stevenson, *The World Trade Organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107, 125 (2002).

71. *Id.* at 125.

72. *Id.*

73. *See id.*

74. *Shrimp—Turtle AB*, *supra* note 33, ¶ 133.

75. *Id.* ¶¶ 133-34, 147.

country.[76] This requirement, however, has limited applicability to a ban on seal products under the Article XX(a) exception because this ban aims to protect the public morals of Belgium's *own* citizenry.[77] The seal product is imported to Belgium, and therefore Belgium has a direct contact with the product that is the subject matter of the ban and presumably the cause of injury to public morals. The "nexus" requirement of Article XX, therefore, would not be applicable here as territoriality is not an issue.

Second, even if there is skepticism regarding "outwardly directed" regulations, the purpose of Belgium's import ban "is not to force other countries to change their standards, but to be at liberty to prohibit within their own territory the marketing of products (whether domestically produced or imported) derived from practices which involve animal suffering."[78] A regulation that purported to protect the public morals in a foreign country would very likely fail to meet the "necessary" requirement.[79] Here, however, the concern is that the presence of seal products in Belgium is offensive to public morals within Belgium.[80] The country is using the import regulation to

---

76. *Id.* ¶ 133 (noting that there was a "*sufficient* nexus" between the object of the regulation and the regulating state) (emphasis added). In this author's view, the conclusion that a territorial nexus must be established for import bans intended to protect global environmental concerns is misguided. Presumably if the fact that some species of sea turtles sometimes "migrate to, or traverse, *at one time or another*, waters subject to United States jurisdiction," *id.* (emphasis added), is required to establish jurisdiction, then a landlocked country would presumably never be allowed to use trade restrictions to address environmental concerns relating to the sea. The most appropriate reading of the decision is that the Appellate Body wanted to show that the United States had a domestic shrimping industry and this industry was subject to the same standards as the foreign producers. If the United States did not have a comparable industry, the focus would have been placed on the United States' treatment of similar foreign producers.

77. *See* Belgium Law I, *supra* note 9 and accompanying text; Belgium Law II, *supra* note 11 and accompanying text.

78. Stevenson, *supra* note 70, at 126.

79. MCDORMAN, *supra* note 52, § 5.3 (discussing the significance of ensuring that the regulation is truly to protect domestic morals in order for the Article XX(b) exception to apply).

80. *See id.* (observing that under the WTO, if a member state is permitted to "tak[e] trade measures to implement policies *within* their own jurisdiction, including policies to protect living things, the objectives of the General Agreement would be maintained").

supplement domestic legislation that attempts to ban all seal products from foreign and domestic sources.[81] Belgium is not suggesting that there is a more appropriate alternative hunting practice for Canadian seal hunters—rather, the import ban is concerned with harm to Belgium's public morals,[82] resulting from what the country considers to be an immoral trade.[83] Countries have promulgated a number of bans based on their authority to act as "ethical consumers" and this legislation is similarly designed.[84] Objective evidence supports Belgium's intentions, including key sources such as the "texts of statutes, legislative history, and pronouncements of government agencies or officials."[85]

2. *The Least Trade-Restrictive Measure*

The second element within the necessary test is that the regulating member must adopt the least trade-restrictive measures possible to attain its goal.[86] As the Appellate Body confirmed in *Korea—Beef*, to

---

81. *See* Belgium Law I, *supra* note 9; Belgium Law II, *supra* note 11.

82. *See* Comm. on Technical Barriers to Trade, *supra* note 12.

83. *See id.*

84. Stevenson, *supra* note 70, at 126-27; *see, e.g.*, Dog and Cat Protection Act of 2000, 19 U.S.C. § 1308 (2006). The Dog and Cat Protection Act aims to prevent, among other things, U.S. imports of cat and dog fur because of the United States' objection to the slaughter of cats and dogs for their fur. 19 U.S.C. § 1308(b)(1). Some believe this Act allows an Article XX defense because Congressional findings from this Act state:

> [t]he trade of dog and cat fur products is ethically and aesthetically abhorrent to United States citizens. Consumers in the United States have a right to know if products offered for sale contain dog or cat fur and to ensure that they are not unwitting participants in this gruesome trade. . . . [the ban] is also consistent with provisions of international agreements to which the United States is a party that expressly allow for measures designed to *protect the health and welfare of animals*. . . .

Pub. L. 106-476, Title I, § 1442, 114 Stat. 2163 (Nov. 9, 2000) (emphasis added); *see* Stevenson, *supra* note 70, at 139-40. Further, "[p]olling shows 79% of American voters oppose the Canadian seal hunt." *Join the Boycott to End the Hunt*, *supra* note 16. Similarly, a number of countries, including Belgium, have banned the production of foie gras (produced by force feeding of ducks and geese) within their borders. Canadian Coalition for Farm Animals, Facts About Our Food: Foie Gras, http://humanefood.ca/docs/foie_gras_factsheet_6.pdf (last visited Mar. 23, 2009).

85. *U.S.—Gambling AB*, *supra* note 41, ¶ 304.

86. *Korea—Beef*, *supra* note 68, ¶ 165 (citing Panel Report, *United States—*

be considered "necessary" under Article XX, "a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[87] However, if no alternative is "reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[88] At the same time, "there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective."[89] The most recent decision on point was in *Brazil—Tyres*, where the Panel noted that while an import ban is a drastic measure, recent cases illustrate that it is possible to "successfully defend[] an import ban on importation under Article XX."[90]

As Belgium's restriction is plainly a ban on importation of certain products, the question becomes, is this the least trade-restrictive means possible? The Appellate Body acknowledged that this analysis entails a degree of balancing.[91] In *Korea—Beef*, and reaffirmed in *Asbestos*, "[t]he more vital or important [the] common interests or values are, the easier it would be to accept as 'necessary' a measure designed" to achieve those ends.[92] The *Brazil—Tyres* panel adhered to this line of reasoning and set out four factors for a country to weigh in conducting the assessment: (1) the importance of the objective pursued; (2) the trade-restrictiveness of the measure; (3) the

---

Section 337 of the Tariff Act of 1930, ¶ 5.26, L6439-36S/345 (Nov. 7, 1989)).

87. *Id.* (citing Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L6439-36S/345 (Nov. 7, 1989)).

88. *Id.* (citing Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L6439-36S/345 (Nov. 7, 1989)).

89. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.211, WT/DS332/R (June 12, 2007) [hereinafter *Brazil—Tyres*].

90. *Id.* ¶ 7.211 & n.1377 (stating that "an import ban, [i]s by design as trade-restrictive as can be in respect of the products that it covers" but that the European Union recently "defended an import ban on importation under Article XX, in the *EC—Asbestos* case").

91. *Korea—Beef*, *supra* note 68, ¶ 172.

92. *Id.* ¶ 162; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (Mar. 12, 2001).

contribution of the measure to the objective; and (4) the availability of alternative measures.[93]

First, relating to the importance of the objective pursued, the interest here is not of the "highest degree"—the interest does not relate to "the preservation of human life and health."[94] However, the Appellate Body has also considered objectives arguably less vital than threats to life and health to be necessary, including "money laundering, fraud . . . and underage gambling."[95] Nevertheless, this factor is the most likely to weigh against the necessity of Belgium's trade measure.

The second factor is very likely satisfied in favor of Belgium because the seal product market is small.[96] At the time of the asbestos dispute, Canadian chrysotile asbestos production had annual sales of $200 million, which constituted 18% of the world's output.[97] Here, on the other hand, Belgium is not even among the top importers of seal skins, importing around $6.3 million worth last year.[98] Also, the economic value of jobs and exports for Canada was radically larger in the asbestos case than in Belgium's case.[99] Further, the social utility of insulating materials (health implications of certain varieties aside) should be considered greater than the availability of seal pelts for use

---

93. *Brazil—Tyres*, *supra* note 89, ¶¶ 7.103 (necessary), 7.113 (trade-restrictiveness), 7.115 (contribution of the measure to the objective), 7.149 (alternative measures).

94. *See id.* ¶ 7.151 (holding that protection of human health and life "is both vital and important in the highest degree").

95. *U.S.—Gambling Panel*, *supra* note 40, ¶ 6.533.

96. *See* Int'l Fund for Animal Welfare, *supra* note 55.

97. Press Release, Foreign Affairs and Int'l Trade Canada, Canada to Appeal WTO Decision Regarding France's Ban on Chrysotile Asbestos (Sept. 18, 2000), *available at* http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&FileSpec=/Min_Pub_Docs/103738.htm.

98. *See* Int'l Fund for Animal Welfare, *supra* note 55 (estimating imports worth €4.8 million). In prior years, the United States and Mexico were consumers of these seal pelts; however, the pelts are no longer sold in the United States in accordance with the Marine Mammals Protection Act. *Id.* The largest seal skin importers, in descending order of pelts imported, are: Norway, Greenland, Germany, China, Poland, Denmark, Hong Kong, Greece, France, Russia, and South Korea. Harpseals.org, Frequently Asked Questions, http://www.harpseals.org/about_the_hunt/faqs.html (last visited Mar. 23, 2009).

99. *See supra* note 97 and accompanying text.

in high-end fashion design. In short, the restriction does not involve a concern as great as human health, but the competing interests are also less valuable, therefore the balancing test used to determine necessity must account for this.

One foreseeable objection and a relevant consideration in assessing the third factor, "trade-restrictiveness of the measure," is related to the comprehensiveness of the restriction. Belgium's ban is a flat ban on imports of seal skins, which differs from other regulations aimed at preventing animal cruelty in that the Belgian ban is not based on a particular process.[100] For example, an E.U. ban on furs from animals captured through the use of leg traps[101] would allow exporters to adopt humane animal hunting practices and then export the products. Similarly, at one point, the European Union considered legislation that "would establish more humane standards [for chickens in regards to] sanitation, stocking densities, ventilation, and surgical procedures such as debeaking and castration."[102] These two regulations, therefore, would ban a product based on the process under which it was stored or prepared for consumption. These measures would be similar to the *Shrimp—Turtle* case, where the Appellate Body permitted standards to be imposed prior to importation, and there was not an outright ban.[103] Belgium's law, in contrast, provides that absolutely no seal products are allowed regardless of the required standards (the hunting method) under which the seals are exported.[104]

Finally, under the fourth factor, a respondent has the opportunity to show why a ban is "'necessary' [even] in . . . light of [the] alternative" options.[105] Belgium could convincingly argue that its

---

100. *See* Belgium Law I, *supra* note 9; Belgium Law II, *supra* note 11; *see also* INT'L FUND FOR ANIMAL WELFARE, *supra* note 10 (explaining that import permits are never granted, which results in a de facto flat ban on imports).

101. *See* Thomas, *supra* note 50, at 619 (noting the European Union's proposed legislation aimed at preventing the trapping of animals through the use of leg-hold traps).

102. *Id.* at 605.

103. *See Shrimp—Turtle AB*, *supra* note 33, at 141 (discussing the permissibility of a U.S. import restriction based on the process by which subject shrimp are harvested).

104. However, this law has an exception for the Inuit communities, which is discussed below. *See infra* Part IV.C.1.

105. *U.S.—Gambling AB*, *supra* note 41, ¶ 311.

objection is not strictly limited to the method of capture or production process; it is instead a categorical opposition to the use of certain animals being hunted commercially for clothing. Accordingly, only a measure that would eliminate the market for seal products entirely could attain these ends. While it is true that an import ban is the most restrictive way to affect a product's importation, such restrictions are not per se prohibited, and in fact have been upheld recently.[106]

Canada will most likely argue that if Belgium must take any trade measure at all, then explicit, perhaps even graphic, labeling system could be used instead. Such a measure was employed with regard to tobacco products.[107] Studies showed that tobacco warnings have impacted consumer habits.[108] However, two factors prevent the cigarette example from being dispositive here. First, although pictures of baby seals would evoke sympathy, warnings regarding the potentially fatal effects of smoking on human health would undoubtedly be more persuasive to consumers. Second, where the Appellate Body did rule that labeling is more appropriate, the domestic country was not applying the same warnings on foreign products.[109] There must be more leeway for a country to make use of prohibitions when they are designed to compliment domestic regulations that treat national producers identically. Considering the underlying policies of the ban, and the nondiscriminatory application of them, Belgium's ban should be considered necessary.

Belgium's ban on seal product imports supports an important domestic objective, for which there is no other effective means of attaining. Although the law is highly trade-restrictive, it should still be considered the least restrictive trade measure practical under the circumstances.

---

106. *See Reformulated Gasoline*, *supra* note 33, ¶ 7.211 & n.1377.

107. Michelle O'Hegarty et al., *Young Adults' Perceptions of Cigarette Warning Labels in the United States and Canada*, PREVENTING CHRONIC DISEASE: PUB. HEALTH RES., PRAC., AND POL'Y (Apr. 2007), *available at* http://www.cdc.gov/pcd/issues/2007/apr/06_0024.htm.

108. *Id.*

109. Dispute Settlement Panel Report, *Thai Restrictions on Importation of and Internal Taxes on Cigarettes* (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 200, *reprinted in* 30 I.L.M. 1122, 1136 (1991).

C. The Chapeau Requirement: No Arbitrariness or Unjustified Restriction on International Trade

Assuming that Belgium's ban is regarded as an attempt to protect public morals, and that such measures are necessary to do so, the final step of assessing a successful invocation of Article XX is to consider whether the measures are "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[110] As the Appellate Body has stressed, compliance with the Chapeau is a separate requirement that must be met when relying on an Article XX exception.[111] The Chapeau is essentially a requirement that the country imposing the ban act in good faith.[112] This is necessary to balance the competing rights of the two members: the substantive right to the free export of goods and the right of other members to limit the goods entering their territories.[113]

There is no reason to think Belgium is acting in bad faith because it is not protecting a domestic industry and it does not distinguish between exporting nations. The first part of the Chapeau, requiring that a country's measures not be "arbitrary or unjustifiable," must be considered.[114] There are a number of factors that are relevant in determining the legitimacy of the import ban, including traditional communities and prior negotiations.

1. Arbitrariness—Exception for Traditional Communities

Belgium seeks to prevent the sale of seal products within its borders because a large number of its citizens are disturbed by the seal hunt, its methods, and the products derived from it.[115] Presumably, Belgium considers all seal products harmful to public morals, as the ban effectively applies to seal products obtained by any means.[116] The

110. GATT, *supra* note 7, art. XX, Chapeau.

111. *Shrimp—Turtle AB*, *supra* note 33, ¶¶ 156-57.

112. *Id.* ¶ 158 ("The [C]hapeau of Article XX is, in fact, but one expression of the principle of good faith.").

113. *Id.* ¶ 159.

114. GATT, *supra* note 7, art. XX, Chapeau.

115. *See* Comm. on Technical Barriers to Trade, *supra* note 12.

116. *See* Belgium Law I, *supra* note 9; Belgium Law II, *supra* note 11.

law does, however, make an exception for seals caught by native Inuit communities.[117] If the ban purports to be based on preventing animal cruelty, then perhaps the Belgian law could be considered arbitrary as it allows the Inuit communities to continue the seal hunt. These are the communities that most prominently use hakapik clubs.[118] Some argue that the Inuit exemption therefore damages Belgium's claim that the ban is intended to protect the public morals by reducing animal suffering.[119]

The practice of killing seals is generally unnecessary and inhumane in this author's view, especially when using clubs instead of rifles. However, the exception for traditional communities withstands scrutiny considering the importance of allowing indigenous communities to maintain traditional practices. The U.N. Declaration on the Rights of Indigenous Peoples notes the importance of allowing these communities to "freely pursue their economic, social and cultural development" and to maintain their distinct identities and characteristics.[120] In practice however, the exception does not appear to have much significance because the number of traditional communities that commercially hunt seals is low.[121] A native community killing seals for survival and subsistence can certainly be considered less damaging to public morals than the level of cruelty accompanying a commercial hunt. As such, both conceptually and empirically, the exception for traditional communities does not make the ban arbitrary or unjustified in its application.

---

117. Belgium Law I, *supra* note 9.

118. *See* Posting of Simon Lester to International Economic Law and Policy Blog, http://worldtradelaw.typepad.com/ielpblog/2007/07/from-dolphins-t.html# comments (July 31, 2007, 6:11 EST).

119. *See* Posting of Mark Benitah to International Economic Law and Policy Blog, http://worldtradelaw.typepad.com/ielpblog/2007/07/from-dolphins-t.html# comments (July 31, 2007, 9:18 EST).

120. U.N. Declaration on the Rights of Indigenous Peoples art. 3, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

121. *See* Harpseals.org, *supra* note 98.

2. *Justifiability—Prior Negotiations*[122]

In *Shrimp—Turtle*, the Appellate Body conducted a separate assessment of whether the U.S. trade restriction was justifiable in light of the United States' efforts to engage in negotiations before restricting trade.[123] Whether a country engaged "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements [in attempting to protect its interest] before enforcing the import prohibition" is a factor that "bears heavily" in appraising justifiability.[124] This factor, however, is not a strict procedural requirement.[125] Countries are not required to enter into negotiations that provide merely a theoretical possibility of a non-trade-restricting resolution.[126] In Canada's complaint against Belgium, however, there has been dialogue between upper-level officials from both parties.[127] In fact, Canada opposed any ban on seal products rigorously and consistently,[128] despite the growing number of countries that have been pushing to ban seal products in their territories.[129] Belgium, therefore, is not required to engage in a dialogue that would be futile.[130]

---

122. The WTO Appellate Body has treated prior negotiation efforts as a factor in its necessity analysis, *see U.S.—Gambling AB*, *supra* note 41, ¶¶ 315-18, and in other instances it has addressed this factor in its justifiability analysis under the Chapeau. *Shrimp—Turtle AB*, *supra* note 33, ¶¶ 166-75.

123. *Shrimp—Turtle AB*, *supra* note 33, ¶¶ 166-76.

124. *Id.* ¶ 166.

125. *See U.S.—Gambling AB*, *supra* note 41, ¶ 325 (explaining that failure to initiate negotiations prior to implementing a trade-restricting regulation does per se invalidate a GATT Article XX (or GATS XIV) defense).

126. *See id.*

127. *See* Adeba & Berthiaume, *supra* note 1.

128. *Id.*

129. *See* Int'l Fund for Animal Welfare, *supra* note 55.

130. In reference to Canada's WTO complaint, the Fisheries Minister states that "Canada won't be 'a wuss' against European Boycotts." *Ottawa Prepares WTO Challenge on Belgium Seal Ban*, CBC NEWS, Aug. 1, 2007, *available at* http://www.cbc.ca/canada/newfoundland-labrador/story/2007/08/01/wto-seals.html. Presumably, the Minister was suggesting that Canada would not be receptive to changing its animal welfare policies. The seal trade is not the first cross-Atlantic animal welfare dispute, and historically, Canada has opposed related legislation promulgated by European communities. André Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs From*

D. Summary of an Article XX(a) Analysis

Belgium's ban on the importation of seal products should be entitled to a defense under an Article XX(a) exception. Trade regulations based on animal welfare interests qualify as valid considerations regarding public morals.[131] Looking at the wide variety of concerns that have spurred import and export regulations, animal welfare is clearly paramount in Belgium, and indeed much of Europe and North America.[132] The regulation supports a domestic legislation implemented to protect its own citizens' morale, and its ban is the only way to prevent Belgium from participating in a cruel industry; both of these factors support the necessity of such a trade restriction. Finally, the import ban is not arbitrary or unjustified as it applies equally to all seal products and is consistent with Belgium's policy priorities.[133]

V. EXCEPTION UNDER ARTICLE XX(B)—PROTECTION OF "HUMAN, ANIMAL OR PLANT LIFE OR HEALTH"

Although an Article XX(a) exception is the best option for countries asserting an Article XX defense, it is also possible that Article XX(b) could be successfully invoked. This provision grants WTO member states the ability to take measures "necessary to protect human, animal or plant life or health."[134] The format for an exception analysis under Article XX(b) is in many cases similar to the analysis under Article XX(a).[135]

As with Article XX(a), any measures that are provisionally justified under the scope of Article XX(b) and are deemed necessary must also accord with the requirements of the Chapeau.[136] As argued above in Part IV.C, the Belgium measure that bans seal products

---

Animals Taken By Leghold Traps, 8 J. ENVTL. L. 237, 242 (1996).

131. *See supra* Part IV.A.

132. *See supra* notes 64-66 and accompanying text.

133. *See supra* note 12; *see also* Belgium Law I, *supra* note 9; Belgium Law II, *supra* note 11.

134. GATT, *supra* note 7, art. XX(b).

135. Where the analysis would be the same under either provision, this article makes reference to the relevant portion of the XX(a) assessment.

136. GATT, *supra* note 7.

would not be unjustifiable or arbitrary, and it certainly does not have protectionist intentions.[137] The arguments asserted above would be applicable here, and therefore this article does not separately address the Chapeau under Article XX(b).

A. "Human, Animal or Plant Life or Health"

The first prong of an Article XX(b) exception requires that the trade-restrictive measure in question aims to protect "human, animal or plant life or health."[138] Although Article XX(b) would facially appear to include an import restriction justified by considerations of humane treatment toward seals, exceptions based on animal welfare are often categorized under Article XX(a).[139] This is because certain narrow interpretations of Article XX(b)'s "animal . . . life or health" clause focus on the spread of diseases as the underlying policy justification for the exception.[140] These interpretations seem to be driven by a concern with how animal health ultimately affects human health, as opposed to animal health in its own right.[141] This result follows from a constricted view of the limited drafting history of the Article wherein the term "sanitary" was often invoked to characterize the exception.[142] This reading, however, does not reflect the plain meaning of the text or member states' widespread understanding at the adoption of the Article XX(b) exception. Because there were already in place "treaties and laws that restricted the importation of dead animals or animal parts (e.g., trophies) . . . [and since] an import restriction cannot protect the life or health of a *dead* animal, Article XX(b) must logically be read as enabling restrictions that serve as a disincentive for animals to be killed."[143] The legislative intent indicates that animal life and health is an independent, valid policy

---

137. *See supra* Part IV.C.

138. GATT, *supra* note 7, art. XX(b).

139. *See generally* Thomas, *supra* note 50, at 618; Stevenson, *supra* note 70, at 136.

140. Stevenson, *supra* note 70, at 136; Thomas, *supra* note 50, at 618.

141. *See* Thomas, *supra* note 50, at 618.

142. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 40 (1991). At the time of its drafting, the exception was Article 43 of the International Trade Organization Charter. *See id.*

143. *Id.* at 52-53.

goal. This fact is particularly supported because the drafting country's domestic legislation "had import restrictions on animals for the purpose of protecting the life or health of humans, plants, or other animals" in place before 1927 Convention.[144]

Article XX(b) has received more clarification from dispute settlement bodies than its Article XX(a) counterpart, and its scope has been addressed in several disputes. The recent panel decision in *Brazil—Tyres* confirms the view that animal health is a concern apart from the ultimate effect on humans. The Panel and the parties, not surprisingly, focused primarily on the effects that the disposal of waste tyres could have on human health, however, the Panel did make specific findings with respect to the effects on animals and plants.[145] For example, the Panel noted that past tyre fires "kill[ed] thousands of fish in a nearby creek due to the oil released from the tyre fire."[146] The Panel then found that "contamination of water and soil leads to an inevitable negative impact on animal and plant life and health."[147] Further, it was significant that "evidence tends to show that mosquito-borne diseases, specifically 'dengue,' also affect animals such as monkeys, through the same vectors as humans."[148] In some instances, admittedly, the Panel seemed to focus primarily on the fact that harm to animals will lead to adverse effects for humans.[149] In others cases, however, the effects on animal health were treated as significant concerns, even when the harm did not have an upstream effect on the health of the surrounding human population.[150]

Ultimately the protection of animal health, as the plain text of the exception would seem to indicate, is within the scope of Article XX(b)'s exception.[151] This interpretation is supported by the context of the Article's drafting, its legislative history, as well as

144. *Id.* at 52.

145. *Brazil—Tyres*, *supra* note 89, ¶¶ 7.84-7.93.

146. *Id.* ¶ 7.88.

147. *Id.*

148. *Id.* ¶ 7.90.

149. *Id.* ¶ 7.83.

150. *Id.* ¶¶ 7.84-7.93 (describing, under a separate heading, the "[r]isks posed to animal or plant life or health arising from the accumulation of waste tyres").

151. GATT, *supra* note 7, art. XX, Chapeau.

contemporary panel interpretations.[152] The first step in an Article XX(b) assessment, however is not for a dispute settlement body to "examine the desirability of the declared policy goal" or to critique "the level of protection that [the implementing country] wishes to achieve."[153] Instead, if a country intends to protect the health or life of animals through trade regulations, this should fall squarely within the scope of Article XX(b). The obstacle, and the more difficult hurdle to surmount, will be fulfilling the "necessity" step of the exception.

B. "Necessary" for the Protection of "Human, Animal or Plant Life or Health"

The second prong of the Article XX(b) test, like section (a), requires that the restriction be "necessary" to protect the interest at stake.[154] This analysis in many ways parallels the necessity analysis in Part IV.B above. Particularly, the "least restrictive trade measure" requirement is sufficiently similar to section (a) and therefore, will not be repeated here.[155] However, one important difference remains: while the extraterritorial effect of the seal product ban is not fatal to Article XX(a) because the morals being protected are those of Belgian citizens, in Article XX(b), the interest being protected—the health of animals—is actually located in the exporting country. This factor makes the necessity requirement difficult to fulfill because it is not clear whether countries are entitled to take actions protecting "human, animal or plant life or health" beyond their country's territorial jurisdiction. While there is commentary in support of each side of the debate, there is no consensus and the WTO dispute bodies have not settled the issue.

---

152. *See, e.g.*, *Brazil—Tyres*, *supra* note 89, ¶¶ 7.84-7.93.

153. *Id.* ¶ 7.97.

154. GATT, *supra* note 7, art. XX(b).

155. *See supra* Part IV.B.1 and accompanying text. Similar to the discussion above, the Belgian ban seeks to protect seals from being killed commercially. *See* Belgium Law I, *supra* note 9; Belgium Law II, *supra* note 11. Based on the text of the ban itself, there is no indication that Canada's use of a certain method in the hunting of seals would alter Belgium's position. *See* Belgium Law I, *supra* note 9; Belgium Law II, *supra* note 11. The only effective way to attain Belgium's goals would be an import prohibition.

1. WTO Case Law: Tuna—Dolphin & Shrimp—Turtle

The last time a WTO dispute body directly addressed the case of territorial limits under Article XX(b) was in the *Tuna—Dolphin* cases.[156] These Panels made two negative findings on Article XX(b)'s extraterritoriality applicability. First, the Panels found "that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be considered 'necessary' for the protection of animal life or health in the sense of Article XX(b)."[157] Second, the *Tuna—Dolphin* Panel found that the scope of Article XX(b) simply did not include territories beyond those that the member state controlled.[158] Ultimately, however, neither of the Panel's reports were adopted and would therefore be unpersuasive precedent.[159]

A case that holds strong weight as precedent is the Appellate Body's decision in *Shrimp—Turtle*. This decision was decided only under Article XX(g) and unfortunately does not provide much guidance to the territorial limits of section (b).[160] However even

---

156. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594, 1594-1623 [hereinafter Tuna—1991]; General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, June 1994, 33 I.L.M. 839, 842-903 [hereinafter Tuna—1994]. The GATT Council did not adopt these GATT Panel Decisions. Howse, *supra* note 33, at 516. Therefore, they are not binding on the parties to the dispute. *Id.* Accordingly, the panel decisions are not available in the official GATT publication for decisions.

157. Tuna—1994, *supra* note 156, ¶ 5.39. This finding was explicitly overruled in *Shrimp—Turtle*, where the Appellate Body stated "that conditioning access to a Member's domestic market . . . may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX." *Shrimp—Turtle AB*, *supra* note 33, ¶ 121; *see* Howse, *supra* note 33, at 500 (explaining that "[i]n identifying this error of the law, the typically cautious Appellate Body used emphatic language, suggesting disapproval of the basic approach taken in Tuna/Dolphin as well as by the panel below in Shrimp/Turtle"). Arguably, even under the *Tuna—Dolphin* ruling, if a country's market for the relevant product was very strong, an import ban could significantly lower the demand for seals and thus lower the number of seals killed. This would presumably provide some degree of protection for seal health and life, and could potentially be a "necessary" course of action.

158. *See* Tuna—1991, *supra* note 156, ¶ 5.32.

159. Howse, *supra* note 33, at 516.

160. *Shrimp—Turtle AB*, *supra* note 33, ¶ 125. Regarding section (g), the

though section (b) requires a showing of "necessity," and section (g) requires measures to merely "relate to" the objectives sought, the Appellate Body still considers territoriality in making its findings.[161] It seems plausible to read the case as saying that the Appellate Body did not want to foreclose the protection of "human, and animal or plant life or health" abroad, and therefore simply resolved the case on other grounds.[162] What *Shrimp—Turtle* did do however, is overrule the Panel below as well as the *Tuna—Dolphin* cases, leaving the question of Article XX(b)'s territorial scope open.[163] The Appellate Body concluded that a country was entitled to ban imports of a product based on the harm that its production caused to an endangered species.[164] The Appellate Body noted that "in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States."[165] Some view this conclusion as an implicit recognition that there truly must be a territorial nexus between the harm and the country imposing the ban.[166] Others read the *Shrimp—Turtle* decision to mean that the Appellate Body was using the idea of a "nexus" primarily to address their concern that countries may attempt to externalize environmental costs or engage in protectionism by imposing higher standards on foreign producers.[167] It is clear, however, that the Appellate Body was unwilling to establish a bright-line rule forbidding countries from using trade measures to protect legitimate interests beyond their borders.

Appellate Body did state that they did "not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation." *Id.* ¶ 133.

161. *See id.* ¶¶ 72, 164, 168.

162. *See id.* ¶¶ 184-86 (finding the United States' measure was arbitrary and unjustifiable discrimination, while noting that "[w]e have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles").

163. *Compare* Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 7.46-7.51, WT/ DS58/R (May 15, 1998), *with Shrimp—Turtle AB*, *supra* note 33, ¶¶ 184-86.

164. *Shrimp—Turtle AB*, *supra* note 33, ¶ 185.

165. *Id.* ¶ 133.

166. Thomas, *supra* note 50, at 629.

167. Howse, *supra* note 33, at 504.

2. *Commentary on Article XX(b)'s Territorial Scope*

While no Panel or Appellate Body decision (none that are good law at least) has resolved the question, commentary on the topic has been anything but sparse. This is not surprising as Article XX(b) could be an incredibly useful tool in permitting countries to use trade measures to address human rights violations. For example, a country could ban products derived from child labor or diamonds from conflict zones.[168] Under such a reading, this same exception could potentially allow measures for the protection of animal health or life. Some fear, however, that the scope of Article XX(b) could be expanded to make the exception overly broad and threaten the objective of the GATT.[169] On the other hand, some scholars are concerned that dispute bodies may treat Article XX(b) so narrowly as to marginalize its usefulness—undermining the non-trade concerns that the GATT drafters considered essential to a global economic environment.[170] After all, the "GATT text . . . reflects the recognition of non-trade public values, which are meant to prevail in the event of conflict with its free trade rules."[171] Accordingly, the drafters "included a very broad range of human interests recognized widely at the time as being fundamental or related to very basic human values."[172]

---

168. *See, e.g.*, Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. U. J. INT'L HUM. RTS. 153 (2007) (workers rights); Matthew T. Mitro, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. U. L. REV. 1223 (2002) (child labor); Carlos Manuel Vázquez, *Trade Sanctions and Human Rights—Past, Present, and Future*, 6 J. INT'L ECON. L. 797 (2003) (human rights). Also note that both of these import bans (child labor and diamonds) could potentially be defensible under a public morals exception.

169. *See, e.g.*, MCDORMAN, *supra* note 52, § 5.3.

170. Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000), http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html.

171. *Id.*

172. *Id.*

3. What Is the Appropriate Territorial Scope of Article XX(b)?

There is no definitive ruling on the geographic range of Article XX(b) and commentators have hardly achieved a consensus on the issue. The practice of the Appellate Body is to make necessity determinations under Article XX through the use of a balancing test.[173] The test's prominent factors include: (1) the effect the measure will have on the policy goal sought, (2) the overall importance of the interests protected, and (3) the trade measure's impact on international commerce.[174] This same test is appropriate for determining the extraterritorial application of an Article XX(b) trade restriction. In certain circumstances, then, Article XX(b) could be used to protect interests outside the geographic bounds of the member state invoking the exception.

Despite this, Belgium would fail to meet the "necessity" prong in the case of its ban on seal products. Unlike the compassionate consumer argument under Article XX(a)—which would provide significant protection for domestic public morality by keeping seal products out—Article XX(b) will have only a slight impact on achieving the goals sought. Foreclosing the Belgian market to seal products would only slightly lower the damage to animal health and life (presumably the seals would still be hunted and the pelts would be sold elsewhere).[175] That is, an import ban would protect public morals, but it would not be effective in preventing the killing of seals (at least as long as many other countries did not adopt such a ban). While the ban would serve the same function whether it was implemented to protect public morals or animal health, it would be more effective in the prior situation, and therefore the first factor of the balancing test would not be strong under Article XX(b). The second factor may be weak as well, as public morals would largely be considered more important than animal health (though here the two goals obviously work in conjunction with each other). The third factor is the only one that is strong under Article XX(b), because the Belgian market for seal products is not particularly large.[176] Ultimately, because there is a

173. *Korea—Beef*, *supra* note 68, ¶ 164.

174. *Id.*

175. Int'l Fund of Animal Welfare, *supra* note 55 (noting that imports to Belgium are modest).

176. *Id.*

sliding scale based on the importance of the interest sought and the restrictiveness of the measure taken, it is likely that the necessity prong would not be met under Article XX(b) analysis. Other measures, for example, mandatory labeling, could lower demand and have a better chance of withstanding "necessity" scrutiny under Article XX(b).

C. Summary of an Article XX(b) Analysis

Protecting the health and life of animals falls within the scope of Article XX(b). The drafting history and text itself indicates that this is a legitimate policy concern for states in making trade regulations.[177] The difficult standard to meet, again, is the necessity of the measures taken. Here, the balancing of factors may not be as supportive of the import ban when compared with Article XX(a)—which did not face similar hurdles regarding extraterritoriality.

VI. CONCLUSION

Belgium's ban on seal products should be found to be GATT-compliant. The Article XX exceptions under sections (a) and (b) could both potentially be applicable, but Belgium's case would be stronger under section (a). Article XX(a) concerns interests that are regarded as more fundamental than animal health and has more implicit support in state practice, as public morals seem to be the justification for a large number of trade restrictions already taken by WTO member states. Further, Article XX(a) does not involve issues of extraterritoriality. While *Shrimp—Turtle* overruled *Tuna—Dolphin*, leaving extraterritorial trade measures under Article XX(b) an open question, the Appellate Body refused to explicitly rule on the issue.[178] Presumably the next Panel will similarly be hesitant to make any decisive step in expanding the scope of the Article XX(b) exception, therefore making it more likely that a Panel or the Appellate Body

177. *See supra* Part IV.A.

178. *See supra* Part V.B.1 (discussing the *Shrimp—Turtle* decision).

would avoid this controversial issue by resolving the dispute under Article XX(a). While it is not certain how these import bans would be resolved if challenged before the WTO, in this case there is a stronger chance of a public morals based trade-restrictive measure withstanding scrutiny.